FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 5 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 312

JOHN M. TAYLOR, OSCAR A. KENNEDY AND H. RUSSELL HASTINGS, AS THE INDEPENDENT COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF PREFERRED STOCK OF DEEP ROCK OIL CORPORATION,

Petitioners,

vs.

STANDARD GAS AND ELECTRIC COMPANY, REORGANIZATION COMMITTEE OF DEEP ROCK OIL CORPORATION, H. N. GREIS, TRUSTEE OF DEEP ROCK OIL CORPORATION, AND DEEP ROCK OIL CORPORATION,

Respondents.

REPLY BRIEF FOR PETITIONERS

JASON L. HONIGMAN,
Counsel for Petitioners,
2003 Dime Bank Building,
Detroit, Michigan.

A. W. SEMPLINER,
TRAVIS I. MILSTEN,
MILTON J. MILLER,
Of Counsel.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

INDEX

Subject Index

	Page
Introductory Statement	1
I. Standard Has No Claim	2
A. Standard's Claim As a Creditor Should Be Denied Under the Instrumentality Rule	2
B. Standard's Claim Should Be Denied Because an Elimination of the Fraudulent and Unsustainable Charges From Its Account Will Extinguish Its Entire Claim	11
II. The Compromise Allowance of Standard's Claim Is Unfair and Unwarranted	28
III. The Plan of Reorganization Is Based On An Unfairly Low Appraisal of the Debtor's Assets	31
IV. The Offer of the Plan and Its Acceptance Are In Bad Faith	34
Conclusion	36

Table of Cases, Texts and Statutes Cited

Baltimore & Ohio Tel. Co. v. Interstate Tel. Co., 54 Fed. 50 (C. C. A. 4, 1893)	7
Bank of U. S. v. Cuthbertson, 67 Fed. (2) 182 (C. C. A. 4, 1933)	7
Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376 (1899)	6
Centmont Corp. v. Marsch, 68 Fed. (2) 460 (C. C. A. 1, 1933)	5
Davision Chemical Co., Re, C. C. H. Bankruptcy Service, Para. 3656	7
Downey v. Byrd, 171 Ga. 532, 156 S. E. 259 (1930)	6
Maloney Tank Co. v. Mid-Cont. Pet. Co., 49 Fed. (2) 146 (C. C. A. 10, 1931)	5
Marcella Cotton Mills, Re, 8 Fed. (2) 522 (D. C. Ala. 1925)	7
Ottinger v. Bennett, 203 N. Y. 554, 96 N. E. 1123, 129 N. Y. Supp. 819 (1911)	6
Penn. Canal Co. v. Brown, 235 Fed. 669 (C. C. A. 3, 1916)	6
Southern Pacific Co. v. Bogert, 250 U. S. 483, 63 L. Ed. 1099 (1919)	4
Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 Fed. (2) 817 (C. C. A. 4, 1917)	7
12 Fletcher, Corporations (Perm. Ed.), Secs. 5581, 5583-4	7
41 Commercial Law Journal 190 (1936)	7, 8
36 Michigan Law Review 88 (1936)	9
Sec. 77B (h) of Bankruptcy Act	36
Secs. 172-4, 208 of Chap. X of Chandler Act	36

Supreme Court of the United States

OCTOBER TERM, 1938

No. 312

JOHN M. TAYLOR, OSCAR A. KENNEDY AND H. RUSSELL HASTINGS, AS THE INDEPENDENT COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF PREFERRED STOCK OF DEEP ROCK OIL CORPORATION,

Petitioners,

vs.

STANDARD GAS AND ELECTRIC COMPANY, REORGANIZATION COMMITTEE OF DEEP ROCK OIL CORPORATION, H. N. GREIS, TRUSTEE OF DEEP ROCK OIL CORPORATION, AND DEEP ROCK OIL CORPORATION,

Respondents.

REPLY BRIEF FOR PETITIONERS

INTRODUCTORY STATEMENT

We propose to show that respondents have, for the most part, avoided meeting the basic issues of the instant case. We pointed out in the course of our main brief that the basic issue in this case revolves about the question of the validity or invalidity of the Standard claim as a creditor. If, as we have shown, the substantially undis-

puted facts in the completed trial on the merits of the Standard claim show that claim to be invalid in its entirety, then we submit that no amount of camouflaging can avoid the result that there was no justification for allowing to Standard a claim of $5,000,000 as a creditor, even under the mechanism of a "compromise".

In reply to our showing of the invalidity of the Standard claim, respondents rely largely upon evasions and distortions of the facts and issues of this case. We cannot within any fair limits of space answer categorically every one of the points and factual assertions made by the various respondents. To the extent respondents make allegations that are contradicted by our main brief, we must in a large measure rely on the independent judgment of this Court after examining the Record references cited in the respective briefs. By the instant reply, we propose merely to show that respondents' ostensible answers are unsustainable and, for the most part, are merely evasions of the true issues of this case.

I. STANDARD HAS NO VALID CLAIM

A.

STANDARD'S CLAIM AS A CREDITOR SHOULD BE DENIED UNDER THE INSTRUMENTALITY RULE

In the course of our main brief, we have shown that the Instrumentality Rule is applicable by reason of Standard's complete domination and control over the Debtor and its abuse of that control for its own interest and to the detriment of the public securityholders. Respondents for the most part make no direct reply to that position. Respondents have made no serious attempt to disprove our showing of fraud, mismanagement and the abusive and complete control and domination by Standard

over the Debtor. They have rather attempted to avoid the effect of that showing by what amounts to a plea of confession and avoidance, that, even though Standard did commit fraud and abused its control over the Debtor, nevertheless the Debtor was not damaged because, they claim, Standard put into the Debtor an amount far greater than it took out.

That position, we submit, is wholly untenable. In the first place, we have shown in our main brief that there is no legitimate justification for any claim that there are any net valid advancements owing from the Debtor to Standard. Moreover, we shall show at a later point herein that the calculations upon which respondents base their contentions to the contrary are, in fact, unsupported by the Record and utterly unsustainable. Assuming for the moment, however, that there are net valid advancements from Standard to the Debtor, it is, we submit, no argument against the applicability of the Instrumentality Rule.

In the application of the Instrumentality Rule, the issue is not whether there are any net valid advancements from Standard to Deep Rock. It is only where there does exist a claim for actual advancements that the Instrumentality Rule is called into force to relegate those advancements to the position of a capital investment. In all of the cases cited in our main brief where the parent company's claim was denied under the Instrumentality Rule, there were actual advancements from the parent to the subsidiary. In each of those cases the claim of the parent company as a creditor of its instrumentality subsidiary was nonetheless denied by reason of the instrumentality relationship. Thus, even if it were true that Standard had actually advanced substantial sums to the Debtor over and above all withdrawals, nevertheless Standard's claim as a creditor must be denied if the facts of the instant case disclose

an instrumentality relationship. Respondents' contentions to the contrary are a patent attempt to becloud the basic nature of the Instrumentality Rule.

Respondents further seek to distort the basic nature of the Instrumentality Rule by urging that its application herein would result in an unjust enrichment to the preferred shareholders at the expense of Standard. To begin with, there can be no unjust enrichment to the preferred shareholders, where, as we have shown, there are no actual net advancements by Standard to the Debtor. Assuming, however, that there were such valid advancements, the Instrumentality Rule, in relegating the parent to the position of a capital investor in its subsidiary, results in no unjust enrichment. The preferred shareholders are not seeking to recover anything but their own investment. The Instrumentality Rule, as applied by the courts, merely requires that as a matter of justice and equity to innocent third parties, the advancements of a wrongdoing parent company to its instrumentality subsidiary should be relegated to the position of a capital investment. The application of that Rule results in no unjust enrichment. It merely returns to innocent third parties their investment in the subsidiary. In decisions such as *Southern Pacific Co. v. Bogert,* 250 U. S. 483 (1919), cited by respondents in support of their claim of unjust enrichment, no such problems are involved. Respondents' claim that unjust enrichment results from application of the Instrumentality Rule, is an unworthy attack on the inherent justice and equity which prompted this Court as well as the lesser courts of this country to promulgate that Rule.

Respondents seek further to avoid our showing that an instrumentality relationship existed between Standard and the Debtor, by pointing to a number of decisions wherein the courts refused to find an instrumentality relationship.

An examination of those cases reveals facts that are entirely different from those in the instant case. We do not contend that an instrumentality relationship results from the mere existence of the relationship of parent and subsidiary. We do insist however, that under facts such as in the instant case, disclosing domination and abusive control by the parent company over its subsidiary, the instrumentality relationship results. In every such case, the courts, without exception, have pierced through the forms of separate corporate existence and have held the instrumentality relationship established.

In a further attempt at a plea of confession and avoidance, respondents urge that, even if the circumstances here do disclose such abuse of corporate control as to require application of the Instrumentality Rule in denial of Standard's claim as against creditors of the Debtor, that Rule cannot be applied for the benefit of the preferred shareholders. In urging that there exists such a limitation on the Instrumentality Rule, respondents are again attempting to distort the basic nature of that Rule. By that contention respondents are seeking to place a nonexistent technical limitation on a broad rule of justice that brooks no such limitation.

The underlying principle of the Instrumentality Rule is often stated as in the language of Circuit Judge McDermott in thee case of *Maloney Tank Mfg. Co. v. Mid-Cont. Petroleum Corp.*, 49 Fed. (2) 146 (C. C. A. 10, 1931), wherein it is said (150):

> "The doctrine of corporate entity may be disregarded if it is apparent that a wrongdoer is undertaking to use it to play hide and seek with an injured party. * * *"

That, too, is the underlying principle recognized in *Centmont Corporation v. Marsch*, 68 Fed. (2) 460, 464 (C. C.

A. 1, 1933), wherein the parent company's claim was disallowed in receivership proceedings against its instrumentality subsidiary. In disallowing the claim, the Court held:

> "* * * the court will disregard the corporate form and do justice between the corporation and third parties."

Thus, the test is not whether those seeking to invoke the Rule are creditors or preferred shareholders of the subsidiary, but rather, is there an "injured party" or "third parties" who are seeking judicial aid as against a "wrongdoer" who has misused the right of corporate control.

In the course of the decisions cited in our main brief, we have seen that the Instrumentality Rule has been applied in numerous types of situations at the behest of an injured party against a wrongdoing parent in order to accomplish justice, regardless of whether the injured party was a creditor of the subsidiary. Thus, as those decisions show, not only has the parent company been held liable for violations of contracts by its instrumentality subsidiary, but it likewise has been held liable for statutory violations, patent infringements and tortious injuries committed by its instrumentality subsidiary. It has similarly been held liable for mispresentations made to the public in the sale of its instrumentality subsidiary's securities as well as for diversions of such subsidiary's corporate funds.

Ottinger v. Bennett, 203 N. Y. 554, 96 N. E. 1123, 129 N. Y. Supp. 819 (1911);

Downey v. Byrd, 171 Ga. 532, 156 S. E. 259 (1930);

Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376 (1899);

Penn. Canal Co. v. Brown, 235 Fed. 669 (C. C. A. 3, 1916);

Baltimore & Ohio Tel. Co. v. Interstate Tel. Co., 54 Fed. 50 (C. C. A. 4, 1893);
12 Fletcher, Corporations (Perm. Ed.), Secs. 5581, 5583, 5584.

The fact is that whenever the rights of preferred shareholders have been prejudiced by wrongful conduct on the part of the dominating parent company, the courts have not hesitated to look through the corporate entities and to deny the parent company's claim as a creditor or for other relief.

In re Marcella Cotton Mills, 8 Fed. (2) 522 (D. C. Ala., 1925);
Bank of U. S. v. Cuthbertson, 67 Fed. (2) 182 (C. C. A. 4, 1933);
Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 Fed. (2) 817 (C. C. A. 4, 1933).

In urging that the Instrumentality Rule is not applicable at the behest of preferred shareholders, respondents rely primarily on the paucity of authorities rather than any particular array of decisions. The case on which they primarily rely is that of *In re Davison Chemical Company (C. C. H. Bankruptcy Service*, Par. 3656, page 1689) which is an unreported District Court case. The language from that case relied on by respondents is purely dicta, in face of the court's findings which respondents failed to quote. The Court held:

> "I do not find that there were elements of fraud or estoppel or that Eastern was used as a mere agency or instrumentality of Davison" (p. 1690).

A learned analysis concluding that the Instrumentality Rule may be invoked at the behest of public stockholders is contained in a recent article in *41 Commercial Law Journal* 190 (1936) entitled: "May Stockholders Invoke

the Instrumentality Rule" by Paul R. Kach. The writer there states:

> "Rather, it is urged, should minority stockholders be the special wards of the parent and subsidiary rule, always, of course, first granting priority to the outside creditors of the subsidiary. It is not contended that any stockholder should have priority over creditors other than the parent company. Any such contention would upset every conception of corporate law and could not be supported under any of the authorities.
>
> But once outside creditors are taken care of, it is submitted that in all logic and fairness minority stockholders of the subsidiary, themselves free of laches or estoppel, are entitled to status in preference to the parent company. It is the latter that has ignored the corporate distinctions. It was its profit that was sought to be served. It assumed the benefits of ownership and made the subsidiary an instrument for its own purposes.
>
> In so doing it flung into its ventures the assets of the minority stockholders as completely as it did those obtained from creditors, and with as little right. Such outside creditors, having received reimbursement for the hurt inflicted upon them on the credit extended to the subsidiary being appropriated by the parent company, why should the parent be permitted to feast with impunity upon the substance of the minority stockholders similarly diverted from their intended goal and appropriated to the purposes of the parent? Having disgorged to creditors that wrongfully obtained from them, why should restitution to the minority stockholders not be next in order? Any other decision means that the parent may appropriate to its own use the assets of the creditors and minority stockholders of the subsidiary with the certainty that no matter how wrongful its actions it can at least enrich itself by those taken from the stockholders in perfect safety. * * *

In *Centmont Corp. v. Marsh* (C. C. A. 1st), 68 F. (2d) 466, quoting from a Massachusetts case, the

> Court declared that the corporation fiction may be disregarded, 'in order to protect the public, prevent a fraud, or to accomplish some other essential justice.' Accepting that view, the petition of the minority stockholders, in a subsidiary converted into an 'instrumentality' of its parent company, for the benefit of the parent and subsidiary rule as herein referred to, is submitted as ' such other essential justice,' and as one that must be received to 'prevent a fraud.' Otherwise, it is urged the full benefit of the trail blazed by the Supreme Court in formulating this wise and beneficial rule will have been lost, and its remedies withheld from those most in need of succor."

As the writer points out and as the facts of this case disclose, the preferred shareholders or other minority stockholders are the ones who are most likely to be injured by the wrongful domination of the parent company. They are "most in need of succor". They should be "the special wards of the parent and subsidiary rule."

Thus, the attempt by respondents to restrict the benefits of the Instrumentality Rule to creditors alone is without justification in law or justice. If the claim of the parent is to be subordinated to that of third party creditors by virtue of the Instrumentality Rule, the same Rule requires its subordination to the rights of preferred stockholders. Where, as in the instant case, Standard by the compromise in effect recognizes the existence of the instrumentality relationship between itself and Deep Rock by completely subordinating its claim to that of the noteholders, there is in law and equity no basis for refusing the same treatment for preferred stockholders.

The writer of a well-annotated and well reasoned article in *36 Michigan Law Review,* pages 88-96 (1936), in concluding that preferred stockholders are entitled to invoke the Instrumentality Rule, states, in part:

> *"If the parent corporation's claim is subordinated to those of creditors, it would seem that it should be subordinated to those of preferred stockholders as well* • • •. (Our Italics.)
>
> The very weakness of the preferred non-voting stockholder is an argument in his favor. He is peculiarly at the mercy of the controlling stockholder, and consequently the latter may not run the subsidiary in its own interest to the injury of the former • • •" (pages 93, 94).

All of the elements of injustice in Standard's dealings with the Debtor have been injurious and damaging to all of the public securityholders of the Debtor, but particularly to the preferred shareholders who have had no more vote or voice in the management of the Debtor than did the noteholders. The preferred shareholders suffered by the wrongful diversion of the Debtor's assets. They suffered by the wasteful, negligent and fraudulent mismanagement of the Debtor. It is the preferred shareholders whose stock has been manipulated by Standard and the Byllesby interests. It is their investment which is now being sought to be eliminated by the establishment of the Standard claim. It is, we submit, the preferred shareholders who are entitled to insist that Standard be required to retain its position as a stockholder of the Debtor and be precluded from establishing itself as a creditor.

It is respectfully submitted that the undisputed and uncontroverted facts of the instant case require application of the Instrumentality Rule in the denial of Standard's claim. The entire history of Standard's dealings with Deep Rock, as evidenced by the very account upon which its claim is based, discloses beyond question that Deep Rock was organized and operated as a department of the Standard business; that it was at all times under the complete domination and control of Standard; that the

interests of Deep Rock and its public securityholders were at all times flaunted and made subservient to the avarice of Standard.

We respectfully submit, after a careful examination of the reported decisions, we have been unable to find a single instance where the circumstances under which the Instrumentality Rule was applied showed anything that even approached the gross abuse of the corporate relationship that is disclosed by the Record of the instant case. It is submitted that under the substantially uncontroverted facts, Standard's claim should be denied by application of the Instrumentality Rule.

B.

STANDARD'S CLAIM SHOULD BE DENIED BECAUSE AN ELIMINATION OF THE FRAUDULENT AND UNSUSTAINABLE CHARGES FROM ITS ACCOUNT WILL EXTINGUISH ITS ENTIRE CLAIM

Standard's claim is based on the so-called open account, a summary of which it filed in support of its claim (I-61-3). Standard alleges that the open account consisted of some $52,000,000 of debits and some $43,000,000 of credits, leaving a net debit balance of approximately $9,300,000 which is the basis of its claim as a creditor. In our main brief, we have shown that some $20,000,000 of charges included in the debit column of this account are fraudulent and unsustainable and should be eliminated from that account. As we have shown, if only one-half of the charges that we attack are found to be unsustainable, it will nevertheless serve to eliminate Standard's entire claim as a creditor.

In reply to our position, respondents seek by their briefs to set up an entirely new account between Standard

and the Debtor by selecting for inclusion only that portion of the debts and credits which best suits their purpose. The account which is attached to Standard's brief as "Exhibit A" is, as we shall show, no part of the Record in the instant case and is entirely unsustainable and contradicted by the actual facts of this case.

The major theme in the briefs of all respondents upon which they rely in justification of the compromise allowance of Standard's claim at $5,000,000 is their contention that that represents only actually valid items of advancements, for cash and monies paid to Deep Rock or for its benefit. We have seen that even if it were true that Standard had a claim for $5,000,000 of net valid advancements, that an application of the Instrumentality Rule would nonetheless result in a relegation of those advancements to the position of a capital investment in the Debtor. *Although this new attempt by respondents to prove the existence of net valid advancements by Standard is immaterial under the Instrumentality Rule, we shall nevertheless show that it is unsupported by the Record and is nothing more than a studied attempt to distort the basic facts of this case.*

Respondents show that the compromise of Standard's claim adopts the figure of approximately $5,000,000 by reason of inclusion of the following three items:

(1) $2,376,076.31 covering allegedly undisputed net cash advancements by Standard to Deep Rock for the period since February 24, 1928;

(2) $1,585,485.18 representing the net reversal of the credits in connection with the Refining Company transactions which Standard entered as part of the open account in the latter part of 1925; and

(3) $1,100,000.00 as the approximate sum representing interest accumulations on items (1) and (2) above.

The claim that those items are the basis for the compromise is contained in the compromise proposal itself (II-731-4). However, as we have shown in our main brief, no proofs whatsoever were presented in the District Court to justify the use of these figures. In the course of the hearing on the compromise proposal before the District Court, we attempted on several occasions to learn what figures and what transactions were taken into account as the basis for arriving at the foregoing items. Our attempts to do so were frustrated by the respondents who refused to disclose what items were considered and what items were omitted in arriving at the compromise figure.

As we have shown, the only witness at the hearing before the District Court who attempted to discuss the compromise proposal was Mr. Shinners, Vice-President of Byllesby and Company and Chairman of the Respondent Committee, who claims to have negotiated and sponsored the making of this compromise. He was asked if he could explain what items were taken into account in arriving at the compromise figure and his answer was:

> "The specific items that went into it was of no consequence to me" (II-451).

He was further asked on cross-examination, whether the compromise figures took into account any part of the huge sums which Standard wrongfully took out of Deep Rock and he testified:

> "Q. Was any consideration given to the fact that Standard had taken money from Deep Rock that it should not? A. You will have to ask the Trustee that.

> Q, Mr. Shinners, that is a very important consideration. A. I didn't effect this compromise. I acted as the man in between, trying to get two parties that were litigating to agree upon a settlement, and they agreed upon a settlement, and what consideration motivated Mr. Ramsey and his associates, and what consideration motivated Mr. Gibson and his associates, I am not prepared to state to you. I don't know. I was happy to see the two litigants get together.
>
> I acted as a messenger between these two interests. I didn't discuss with them as to whether there was any consideration given to the money Standard had wrongfully taken from Deep Rock" (II-451).

The Respondent Committee thus denied any knowledge of the specific items upon which the compromise figures were based and told us that we "will have to ask the Trustee that."

Thereupon, when the Trustee of the Debtor took the stand, we looked to him to explain what items were taken into account in arriving at the compromise figures. However, when we attempted to cross-examine the Trustee on this subject, his counsel interposed the objection, which was sustained by the District Court, that the Trustee was no party to the compromise, was making no recommendations thereon and therefore could not be cross-examined about it (II-521-4). The Trustee's counsel went so far as to state that to the best of his knowledge the Trustee "has never seen" the compromise proposal (II-524). Thus both the Respondent Committee and the Trustee of the Debtor refused any explanation for the figures upon which the compromise allowance of Standard's claim was based. Standard, as we have seen, produced no witnesses whatsoever in support of the compromise. *Thus, not a single word of testimony appeared in the District Court as to what specific items were taken into account in arriving at the compromise figures used by respondents.*

By presenting Exhibit A of Standard's brief, as well as a similar exhibit presented to the Circuit Court of Appeals, respondents for the first time offer an explanation for the items which formed the basis of the compromise figures, and then only to the extent of the first item of $2,376,000. *Before considering Exhibit A of Standard's brief, it is essential to bear in mind that the exhibit itself is no part of the Record in the instant case.* It is merely a presently belated attempt on the part of respondents to make an *ex post facto* reconstruction of a portion of the figures which they claim to justify the compromise, without hazard of cross-examination by petitioners.

Upon receipt of this Exhibit, however, we have studied it. We find that it is unsupported by the Record, fails to take into account wrongful cash withdrawals by Standard, includes charges which we have shown to be wrongful, omits huge credits to Deep Rock acknowledged by its own claim as filed in these proceedings, and is based on assumptions and suppositions that are contradicted by its proof of claim and unsupported by the facts.

Thus, while a good many of the items included in Exhibit A are shown in the Record, there are many others that are not to be found in the Record. For instance, the entire split-up showing separate amounts for the period before and after February 24, 1928, has no basis for support in the Record. The proofs which were submitted and which are a part of the Record in the instant case as a rule show only total charges by years (I-61-3). In some instances, the charges appear in the Record by months (III-27-53). In any event, the items of debits and credits do not appear in the Record in a way that can justify their division as of February 24, 1928 or any other particular day. A cursory check of the page references shown in Exhibit A of Standard's Brief will reveal that situation.

Also, many of the specific items included in Exhibit A of Standard's brief are not borne out by the Record. Thus, on page 4 of Exhibit A, appear charges totalling $1,503,575.07 as money paid by Standard to H. M. Byllesby & Company. No such charge, either by total or specific items, appears in this Record nor does Exhibit A show any page references in support of it. The major part of the individual items thereof are likewise without any page references and are similarly without any justification in this Record. The same is true of the credits shown on page 5 of Exhibit A, totaling $980,638.08.

Moreover, many of the charges which appear in Exhibit A represent large sums paid to H. M. Byllesby & Company and Byllesby Engineering and Management Company. As we have seen in the course of our main brief, each of these companies was manned by the same individuals who were at the same time the top officers of Standard and the Debtor. They carried on all of their business out of the same offices and in the same form of interdepartmental dealings and memoranda, and together constituted the self-styled Standard or Byllesby Group. To say, as respondents say, that such items are payments to third parties is only a use of words. Standard's burden of proving the complete fairness of all its self-dictated transactions with the Debtor extends equally to all of the charges made by Byllesby & Company and the Management Company.

Nevertheless, Exhibit A of Standard's brief is replete with charges such as that shown on page four thereof, entitled "Reimbursement for Deep Rock Oil Corporation's Proportion of Expenditures Re Rebuilding of Deep Rock Oil Corporation's Offices and Partitions Incident to Office Arrangement—$33,486.25." The given page reference of Volume two, page 93, merely mentions the existence of such a charge. No explanation is made there or anywhere

else in the Record, as to whether that expenditure was reasonable or necessary or whether it was properly chargeable to Deep Rock, rather than some other subsidiary or affiliate of the so-called Byllesby or Standard Group. Nor is there a word of testimony as to how that proportion was arrived at. Particularly is such an item questionable when it is considered that the main business office of the Debtor was throughout at the seat of operations in Tulsa, while the Standard and Byllesby & Company offices were located in Chicago.

Furthermore, respondents are guilty of a gross misstatement of our position when they repeatedly assert that the charges included in the net figure of $2,376,000 contain only "undisputed" items of debits and credits. The fact is that not only have we disputed many of the specific items there included, but, as we have shown, there are no net advancements from Standard to the Debtor.

Thus, the so-called "Sundry Expenditures" by Standard, shown on pages 1 to 3 of Exhibit A of Standard's brief, totaling $457,352.74, have been disputed in our main brief as being without support by any proofs showing their reasonableness, fairness, or propriety. Such, for instance, are the so-called Sundry Expenditures totaling $169,222.15 which Standard charged to Deep Rock in the years 1930, 1931 and 1932, as disbursements to Byllesby & Company and the Management Company for services rendered in in the acquisition of Deep Rock properties in 1919 (Exhibit A, page 3). No word of explanation appears in this Record why those charges should have been made so ne eleven to thirteen years after Standard's acquisition of Deep Rock or exactly what was covered by those charges.

Other charges included in Exhibit A for the period subsequent to February 24, 1928, are likewise objectionable because of the failure on the part of Standard to meets its burden of proving the entire fairness of its own self-dic-

tated transactions with the Debtor. Thus, Exhibit A, page 1, charges Deep Rock $277,475 for the purchase from Byllesby and Company of preferred stock of Utility and Industrial Corporation, an investment trust operated by Byllesby & Company. Of the page references cited, Volume one, pages 55 and 61, show merely Standard's formal proof of claim which shows that such a charge is included in the open account. The remaining page reference given in Exhibit A is Volume two, page 83, which contains no explanation whatever as to why Deep Rock is being charged for such a transaction or why such a transaction should ever have taken place. Standard's own testimony is undisputed that Deep Rock was at all times in dire need of funds for the operation of its own business, and most of the time on the brink of receivership (See our main brief, pages 39-41). It nowhere appears that there was any justification for Deep Rock, an oil company, to be buying the preferred stock of an investment trust. Certainly, in the absence of a very satisfactory explanation of the fairness, reasonableness and propriety of that transaction, such a charge should not be considered as an "undisputed" one.

Likewise, we have shown that Standard had no warrant to pay common stock dividends out of Deep Rock under the facts of the instant case. The charge of $29,328 (Exhibit A, page 1) which Standard presumably paid out to others on common stock dividends subsequent to 1928 is thus likewise a disputed and unwarranted charge against Deep Rock. Furthermore, Exhibit A fails to credit Deep Rock with the discount of $604,849.20 wrongfully kept by Standard in connection with the sale of Deep Rock's ten million dollar note issue. The impropriety of that charge was discussed in the course of our main brief in connection with the invalidity of the interest and discount charges included in the Standard claim and will not here be repeated.

Furthermore, Exhibit A of Standard's brief fails to credit Deep Rock with the sums wrongfully withdrawn by

Standard that did not clear through the open account. Such, for instance, is the item of $980,781 which Standard withdrew as a cash dividend on its common stock in 1930, but which did not clear through the open account (II-89). This item was considered in our main brief as part of the illegal dividend withdrawals by Standard. In addition, Deep Rock paid directly to the Management Company subsequent to February 1928, the sum of $25,416.66, as the proportionate part of the salaries of certain Management Company officials, which payments likewise do not appear in the open account (III-27-40). The impropriety of such charges by the Management Company was discussed in the course of our main brief.

In addition, it appears that a few months prior to receivership, Byllesby & Company charged the Debtor $312,780 for services in seeking an extension of the $10,000,000 note issue (II-75, 173-5, III-1-15-A). This charge was made pursuant to an agreement entered into by four officials of Standard who were at the same time officers of Byllesby & Company, as well as of the Debtor (II-175, 312-59). Deep Rock's signature was affixed by two of Standard's officers who were neither under salary nor allegiance to Deep Rock (II-175, 57, 99, 148-51). This agreement was approved by Deep Rock's Board of Directors at a meeting at which six of the seven members present were officers and directors of Standard or Byllesby and Company, with the remaining director an operating officer of the Debtor whose position was inferior to those present (II-627, 322-31, 531-32). The original of this agreement was not even forwarded to the office of the Debtor at Tulsa but only a copy was enclosed with a letter by which Deep Rock's Secretary-Treasurer was informed of the transaction (II-175). The latter officer of Deep Rock describes that letter as "my first knowledge" of the transaction (II-183).

That charge thus imposed upon Deep Rock is entirely without support in the Record as to its fairness or pro-

priety. That the services for which that charge was rendered were actually of no value whatsoever to Deep Rock cannot be disputed. The proposed extension was not signed by the requisite percentage of noteholders and was never put into force (II-821). Of the total of $312,780 so charged, $143,425 appears in the open account. The remainder of $169,355 was paid in cash directly to Byllesby & Company and is not included in the open account (III-1-15A, II-179-80). Standard tacitly recognizes the insupportability of these charges for extension services by Byllesby & Company when it fails to include in Exhibit A of its brief the $143,425 which it had charged to the open account. That admission should be equally applicable as warranting a credit to Deep Rock for the amount of $169,355 which was paid directly to Byllesby & Company.

We have thus far pointed out additional items which Standard either wrongfully included as debit charges in Exhibit A of its brief, or failed to credit therein moneys wrongfully paid out by Deep Rock during the period since February 24, 1928. To recapitulate, those items are:

(a) Sundry Expenditures	$457,352.74
(b) Utility and Industrial Company stock	277,475.00
(c) Common Stock Dividends	29,328.00
(d) 1930 Common Stock Dividend to Standard	980,784.00
(e) Discount on $10,000,000 note issue...	604,849.20
(f) Management Company Salaries	25,416.66
(g) Byllesby & Company Note Extension Services	169,355.00
Total	$2,544,560.60

Deducting the foregoing total as additional credits to Deep Rock, the net debit balance of $2,376,000 shown in Exhibit A of Standard's brief, which respondents assert to be indisputable, entirely disappears. Thus, we have seen that

respondents' position that Standard made net valid advancements to Deep Rock since 1928 is actually without support in the Record and is in fact unsustainable.

It is noteworthy too, that while Standard's claim as filed is for the amount of approximately $9,300,000, all of which they claim to have accrued since 1928, the only portion of that sum even attempted to be justified by Exhibit A of Standard's brief is the sum of approximately $2,376,000. There is nowhere any serious attempt on the part of respondents to justify the remaining $7,000,000 of that claim.

A further basic fallacy in the computations of Exhibit A of Standard's brief, upon which respondents rely to support $2,376,000 of the $5,000,000 allowed by the compromise, is their assumption that Standard's claim covers only the period since February 24, 1928. Respondents' motive for attempting to avoid the effect of an accounting for the entire period from 1919 is that thereby they seek to avoid an inquiry into the fraudulent transactions which Standard imposed upon the Debtor in the period prior to 1928. Approximately one-half of the unsustainable transactions which we attack in our main brief were charged prior to 1928 and the other half subsequent thereto. By attempting to restrict the Court's inquiry only to transactions subsequent to 1928, respondents seek to avoid the effect of some $10,000,000 of wrongful charges which are included in the open account for the period prior to 1928.

Respondents' attempt to preclude any consideration for wrongful withdrawals prior to 1928 is predicated upon their contention that in February 1928 there was a settlement between Standard and the Debtor whereby some $11,000,000 of Deep Rock's debts to Standard were cancelled. By that transaction, Standard claims to have cancelled all prior wrongful charges contained in the open account. The fact is, however, that the transaction of which they speak was by no means a mere matter of cancellation

of accounts but was in fact a purchase by Standard of common stock in the Debtor. The transaction was entered into entirely at Standard's dictation through its full control of Deep Rock's Board of Directors which, by resolution, agreed that Standard "shall purchase" certain additional common stock for the sum of $11,122,400 (II-625-7, 647-8). Of the nine directors who approved that transaction, eight were Standard officers and directors (II-625, 608, 312-59). This transaction, having been dictated by Standard, it should not now be permitted to change its aspects from a capital investment by a purchase of stock into a mere debt cancellation.

The public securityholders of Deep Rock have a right to insist that Standard stick by that bargain. At the time of that transaction and ever since, Deep Rock's books showed it as an $11,000,000 investment in its capital stock. Likewise, in the published 1928 Annual Report for Standard and all of its subsidiaries including Deep Rock, Standard informed the public securityholders that by that transaction "the capital structure of the (Deep Rock) Company was materially improved during the year" (III-108). Thus, Deep Rock's public preferred stockholders were asked to believe that an additional $11,000,000 of investment had been made by Standard in the capital structure represented by the common stock equity of the Debtor which was a further protection for investors in preferred stock. It was on such published reports that the Taylors and other public stockholders necessarily relied in the purchase and retention of Deep Rock securities. It will little do now for Standard to urge that it is immaterial that that additional $11,000,000 capital investment actually was no investment at all, but merely a cancellation of fraudulent charges which Standard had previously imposed on Deep Rock. Exactly that is what Standard is now urging before this Court when it seeks to disregard all items of wrongful charges prior to the 1928 transaction.

Moreover, Standard's present insistence that its claim is only for the period since February 24, 1928, is contradicted by its own proof of claim which it filed in these proceedings, in which it states:

> "That the said account so due and payable is and represents the balance of account between Standard Gas and Electric Company and Deep Rock Oil Corporation for a period beginning June 1, 1919, and ending February 28, 1933, during all of which period mutual accounts of transactions by and between the said Standard Gas and Electric Company and said Deep Rock Oil Corporation were kept and represented the mutual transactions between said corporations" (I-52).

That, too, is the period covered by Standard's claim as appears in the summary attached to its claim as Exhibit A (I-61-63), as well as in its petition for intervention in the instant proceedings (II-268). Standard should not, at this late date, be permitted to change the account upon which it bases its claim.

We have thus far considered the item of $2,376,000 which is the first of the three items upon which respondents base their justification of the compromise. As to the second item of approximately $1,585,000, the arguments of respondents are equally unfounded. In the first place, it must be borne in mind that that amount represents no particular cash investment on the part of Standard in Deep Rock but merely is part of some bookkeeping credit items totaling $2,544,591.11 which Standard caused to be entered on the open account between itself and Deep Rock in the latter part of 1925, in connection with the Refining Company transactions (II-47-52, 128-9). Respondents assert that that item is likewise an undebatable charge against Deep Rock.

Respondents fail to explain, however, that that charg can only arise in connection with the setting aside of th Refining Company transactions and would merely be credit reversal in the open account. Such reversal, how ever, does not result in an increase of the Standard clai as respondents would have us believe (Respondent Commit tee's Brief, page 53; Standard's Brief, page 69; Trustee' Brief, page 8). Actually, the reversal of the Refining Com pany transactions requires not alone that this item be adde to the open account, but in addition requires at the sam time, the elimination from the open account of the Refinin Company rental charges, income taxes and the huge interes charges accumulated thereon. The net result of such re versal would reduce the Standard claim by some $3,000,00 rather than increase it as respondents seek to urge.

Moveover, the mere fact that a reversal of a bookkeep ing charge would have to be made in connection with the setting aside of the Refining Company transactions is no warrant for saying that that sum represents actual cash advancements by Standard which it is in any event en titled to get back from Deep Rock. As a practical matter, the entire open account was balanced out in 1926 and in 1928, when Standard took common stock for its open account claim in recognition of its position as a capital investment in the Debtor. The credit items which are to be reversed were credited in 1925 and a reversal of those credits would merely increase the open account balance for the year 1925. The balancing out of the open account in 1926 and again in 1928 as a recognition that the open account was a capital investment in the Debtor should like wise preclude Standard from asserting a claim as a credi tor by reason of any increase in the pre-existing balance of that account. Especially is that true under respondents' present position that the effect of the 1928 transaction was a cancellation of all pre-existing debts between the Debtor and Standard.

The basic answer to respondents' position on this item of $1,585,000, as in connection with every other item in Standard's open account claim against the Debtor, is that it is impossible to take a single item or group of items and arrive at a result which would indicate the true amount of Standard's net advancements to the Debtor. It is only by taking the entire claim as presented by Standard which shows $52,000,000 of debits and $43,000,000 of credits and eliminating the unsustainable charges which appear in the debit column, can it be determined as to what amount can properly be deemed the net advancements by Standard to the Debtor. By eliminating the debit charges in the amount of $20,000,000, which we have shown to be unsustainable or in any event as much as one-half of those charges, the entire net debit balance upon which Standard bases its claim becomes nonexistent.

As to the item of interest in the amount of approximately $1,100,000 which respondents claim to be the third item forming the basis for the compromise allowance of the Standard claim, the objections hereinbefore made as to the first two items have equal force. In the first place, if items one and two are not properly sustainable net advancements by Standard to the Debtor, then of course, there is nothing upon which interest can be charged. In the second place, there is not a word of testimony in the Record as to just what method was used in the calculation of those interest charges, on which specific items the interest was calculated, or upon what basis credits for interest, if any, were allowed for funds wrongfully withdrawn from Deep Rock by Standard and its affiliates. The unsustainability of the entire interest charges included in Standard's open account against the Debtor has been considered in our main brief and will not further be here reviewed.

On the whole, respondents' treatment of our contention that there is no net debit balance owing to Standard, is to disregard the entire theory and basis of calculation shown by Standard's own proof of claim as well as the open account itself. Instead of taking the entire period for 1919 to 1933 covered by the open account and Standard's claim as filed, they seek to take only the period since 1928. Instead of including all of the debit charges as well as all of the credit charges contained in the open account, they compile for the first time their own reconstruction of selected portions of the open account, and present it to this Court in the form of Exhibit A of Standard's brief. There they set forth a total of $31,000,000 of debits with $19,000,000 of credits, with a claimed net debit balance to Standard of approximately $12,000,000.

That the actual items and basis of calculation in that Exhibit are unsupported by the Record of this case, we have hereinbefore shown in the course of the foregoing discussion of the items subsequent to February 24, 1928. The fallacies of that Exhibit previously pointed out are equally applicable for the period prior to 1928. Moreover, the very heading of that Exhibit discloses that no credit is given to Deep Rock therein for any "capital stock received from or for the account of Deep Rock Oil Corporation". Thus, some $18,000,000 of common stock which Standard purchased from the Debtor and the purchase price of which it credited on the open account (I-63) is eliminated from all consideration. The inference from respondents' position is that Standard had no obligation to maintain the capital structure of the Debtor which it had created on the Debtor's books and held out as an inducement for investment by public securityholders. The fact is that if that $18,000,000 of credits for common stock investment as shown by Standard's open account is

deducted from the $31,000,000 of cash advancements claimed in Exhibit A of Standard's brief, it leaves only a net of $13,000,000 of alleged advancements by Standard against the $19,000,000 of credits shown by that Exhibit. Thus, instead of a net advancement shown owing to Standard, that Exhibit would show a net amount of some $6,000,000 owing from Standard to Deep Rock.

Respondents' claim that Exhibit A of Standard's brief is a true picture of the cash transactions between the two companies is inherently false and misleading. At best, that Exhibit only purports to show a portion of the transactions which were reflected in the open account. It takes no account of the many fraudulent cash withdrawals which did not clear through the open account. As we have shown in our main brief, it is uncontradicted that many cash transactions took place between Deep Rock and Standard and its affiliates which never appeared in the open account. Such transactions as did not clear through the open account are only known to the extent that they receive incidental mention in the course of this Record. Just how much of Deep Rock's assets were looted through such transactions does not appear herein. *Despite respondents' inferences to the contrary, it is the definite admission of both the Trustee and the Respondent Committee that no independent audit was ever made of the transactions between the Debtor and Standard* (II-525, 437). Thus, there is no way under the instant Record of knowing how many millions of dollars were wrongfully abstracted by Standard from the Debtor by transactions which did not clear through the open account.

It is simple enough for anyone to dip into a mass of figures and pick out selected ones in order to arrive at a desired result. From any common sense viewpoint, however, the only way of approaching the problem of determining whether or not Standard had any net valid ad-

vancements which could constitute the basis of a claim against Deep Rock is by starting from Standard's own accounting as presented by its claim. If Standard's claim includes unsustainable debit charges to the extent of $9,300,000 or more, the net debit balance upon which Standard's claim is based is completely eliminated. Respondents' attempt to avoid that basis of calculation is merely an attempt to distort the facts and issues of this case. We have seen that under the Instrumentality Rule, Standard's claim as a creditor must be denied, even assuming that it has net valid advancements to the Debtor. We submit that irrespective of the Instrumentality Rule, Standard has no net valid advancements to the Debtor.

II. THE COMPROMISE ALLOWANCE OF STANDARD'S CLAIM IS UNFAIR AND UNWARRANTED

In considering the propriety of the compromise allowance of the Standard claim, no amount of evasion by respondents can hide the basic factor that the compromise was unwarranted if Standard's claim is actually invalid. We have shown in the course of our main brief that Standard's claim was actually invalid whether by reason of the unsustainability of the charges contained in its open account or by reason of the Instrumentality Rule. No possible scope of discretion should warrant a compromise allowance of the Standard claim at five million dollars, where, as we have shown, it appeared from substantially undisputed facts that the Standard claim was actually invalid in its entirety.

Respondents' showing that the compromise allowed Standard a claim for only undisputed sums, we have already seen to be wholly without foundation and, in any event, of no consequence under the Instrumentality Rule. Respondents further seek to becloud the basic issues by

urging that the applicability of the Instrumentality Rule is so difficult of ascertainment as to have warranted the instant compromise. While their contention may be true enough in borderline cases, we submit that it has no application to a case of clear abuse of the corporate relationship, such as is shown by the substantially undisputed facts of the instant case. That the instant case is a clear case of instrumentality relationship was the conclusion not only of Circuit Judge Bratton, but of the District Judge as well, when he said:

> "The evidence is overwhelming the Standard ran this company; they officered it; they capitalized it; it is just a child in their hands, and if there ever was a case the law is clear on it is nothing in the world but an instrumentality, according to the admissions" (II-407).

In further support of the compromise, respondents urge that the Trustee and his counsel recommended it. If that contention were of any controlling significance in the instant case, the answer to it is clear and undeniable. In our main brief (pages 92-3), we quote from a statement made in open court by the Trustee and his counsel, that they neither recommended nor rejected the compromise proposal (II-523-4). That statement by the Trustee and his counsel was made during the course of the trial before the District Court to prevent petitioners' attempted cross-examination of the Trustee on the basis and fairness of the compromise proposal (II-521-4). Based on that statement, petitioners were denied the right to cross-examine the Trustee with reference to the propriety or impropriety of making the compromise (II-521-4). After the close of all of the proofs, the Trustee's counsel in the course of his argument took the position for the first time that he recommended the compromise (II-561). At that time, there was no longer an opportunity to cross-examine the Trustee as

to the basis or fairness of the compromise proposal. We submit that no weight should be given to the recommendation of the Trustee's counsel made under such circumstances.

As we have heretofore seen, the compromise, by subordinating Standard's entire claim to Deep Rock's noteholders, is in effect an acknowledgment of the existence of the instrumentality relationship in the instant case. As we have further shown, the same reasons which impel the application of the Instrumentality Rule for the benefit of the noteholders is equally applicable for the protection of the public preferred shareholders. Respondents argue, however, that Standard's subordination to the noteholders is of itself a strong reason in justification of the compromise.

In answer, we desire to point out that, for one thing, Standard is actually making no great concession to the noteholders by allowing them to be paid first. Even under respondents' low appraisal, there is sufficient in assets to pay both the noteholders and Standard, so long as Standard gains the allowance of its claim. Furthermore, even if the compromise were beneficial to the noteholders, that is of itself no justification for sacrificing the rights of the preferred shareholders. Noteholders are entitled to all of the consideration which emanates from their prior rights as creditors. They are not entitled, however, to give away the rights of the preferred shareholders to share in the assets of the Debtor prior to any allocation to Standard. By acknowledging the instrumentality relationship as against noteholders, Standard assured itself of their acceptance of its compromise proposal. Such concession to noteholders cannot justify, however, an unwarranted destruction of the rights of preferred shareholders.

We pointed out in our main brief, that the circumstances of the instant case disclose a studied attempt on the part of

the respondents to secure for Standard the allowance of a claim when, in fact and law, as well as in morals and equity, it has no claim whatsoever. We have further shown that with all of the circumstances showing every reason for an adjudication of the Standard claim on its merits, respondents nonetheless have repeatedly sought to substitute the issue of compromise in the place of the basic issue as to the actual validity or invalidity of the Standard claim. Respondents' attempt to defeat the rights of the preferred shareholders under the subterfuge of a compromise mechanism should, we submit, be defeated by this Honorable Court.

III. THE PLAN OF REORGANIZATION IS BASED ON AN UNFAIRLY LOW APPRAISAL OF THE DEBTOR'S ASSETS

In support of our position as to the impropriety of the appraisal which was submitted by respondents and accepted by the District Court, we pointed in our main brief to the admission of respondents' sole expert witness as well as the Trustee, that the earnings of the Debtor were not taken into account in the preparation and submission of that appraisal. Respondents make no serious dispute of that undeniable fact, but nevertheless seek to becloud that issue by saying that their appraisal was based on "going concern" value. What is meant by "going concern" value that does not take into account earning power is nowhere shown. Respondents offer no explanation for the statement of the District Judge made in open court when he said:

> "The Court: There is no doubt you have a low appraisement. It is a very conservative appraisement because your testimony established you didn't pay any attention to the earning power" (II-566).

Nevertheless, although no further proofs were offered, that appraisal was approved by the District Judge, without any other comment or explanation.

As further evidence of the impropriety of respondents' appraisal, we pointed out in our main brief to the grossly contradictory appraisal previously prepared in 1933 by Mr. Greis, the Trustee, which, together with his testimony in open court, showed a valuation for the Debtor's fixed assets of between sixteen and seventeen million dollars as against the $9,500,000 appraisal now submitted by him. Respondents' sole answer to that gross discrepancy is that the testimony of Mr. Greis "must have been caused by confusion" (Respondent Committee's Brief, page 106). It is unfortunate for respondents that they must relegate themselves to so specious an answer in the face of so important a discrepancy. Lest there be any doubt whether the questions were clear and the answers of the Trustee definite, we respectfully refer this Court to the Record itself for that portion of the testimony (II-519, 512, III-146).

Respondents seek to attack the valuation of the fixed assets by petitioners' expert on the ground that it is based upon earnings for the year 1936, which they claim were much higher than they had been during the years when Standard managed the Debtor. In answer, we desire to point out that it is hardly fair to look to earnings under the Standard management as a fair criterion of the results of a proper operation of the Debtor. The testimony discloses that the year 1936 was considered an average year in the oil business, and that the earnings of that year can be deemed representative of what the Debtor may be expected to earn under proper management (II-505-6, 676).

Respondents seek to make up for the failure of their appraisal to take into account the earning power of the Debtor by now presenting for the first time an *ex post facto* show-

ing that that would have made no difference (Respondent Committee's Brief, Exhibit A.) That exhibit was no part of this Record and is, we submit, no substitute for proofs that were never presented. From that exhibit, respondents argue that the real value of the Debtor's assets based on its earnings should show "a value for the fixed assets, plus operating capital and current inventory of $7,486,480.20" (Respondent Committee's Brief, page 111). *Thus, respondents would have this Court believe that the fair value of practically all of the Debtor's assets is approximately $7,500,000 when the Debtor's undisputed net current assets alone equal that amount* (I-361). *On that basis, respondents would have us believe that the fixed assets of the Debtor are entirely worthless. Such contention is ridiculous on its face.*

The chief discrepancy between respondents' present calculation of earnings as compared with those which appeared in the petitioners' testimony in the District Court is in the item of depreciation and depletion. The figure used by petitioners' expert in the District Court was $850,000 per year as compared with the respondents' claim that the depreciation and depletion should be $1,200,000. In reply, we desire to point out that the basis for depreciation used by petitioners' expert was recognized to be a substantially correct one by the Trustee himself. Both the Trustee and respondents' expert testified that the Trustee had been spending whatever sums were necessary to keep oil production at an even keel and to keep the physical properties in a good state of improvement with such additions as were required from time to time (II-490-1, 518). The Trustee further testified that the sums thus expended formed a reasonable basis for arriving at a proper figure for depreciation and depletion (II-520). Taking those figures and that method of computation, petitioners' expert arrived at the fair basis for depreciation and depletion (II-552-4).

Respondents' figure of $1,200,000 for depreciation and depletion is admittedly based upon the calculations of Mr. Francisco, whom this Record has shown to be Standard's puppet over a period of many years. It was Mr. Francisco, under whose direction was prepared the valuation for the Debtor's fixed assets in the amount of $37,700,000 for the purpose of justifying Standard's declaration of a common stock dividend in March 1930 (II-102, 534-5). While Mr. Francisco aided in the preparation of the instant Trustee's appraisal, he blandly tells us that the appraisal which he formerly prepared fixing a valuation four times the present appraisal was likewise "fair" (II-534-5). It is this same Mr. Francisco who, despite all the fraudulent manipulations of his superiors, never uttered a word of protest throughout all of his years as an officer of the Debtor.

The mute evidence shown by Chart 4 of our main brief, respondents make no serious attempt to dispute. As there appears, the instant appraisal presented by respondents is by far the lowest appraisal ever made of the Debtor's fixed assets. In the face of the gross discrepancies shown by the instant Record and the admitted failure to give any consideration to the Debtor's earnings in the preparation of that appraisal, we submit that that appraisal is unworthy of acceptance by this Court.

IV. THE OFFER OF THE PLAN AND ITS ACCEPTANCE ARE IN BAD FAITH

Respondents make general denials of our charges of unfairness on the part of the Respondent Reorganization Committee. They cannot avoid, however, the undeniable fact that that Committee was initiated and has throughout been controlled by the Standard interests. The Standard interests organized the respondent committee, picked

its entire personnel, housed it and fostered it throughout. Throughout the instant proc dings, the affairs of that Committee have been directly handled by its Chairman, a Vice-President of Byllesby and Company, who was a subordinate of the top officers of Standard. It needs no flights of imagination to demonstrate that in the Respondent Committee's conflict of loyalty between the interests of Standard and the public securityholders, the latter have suffered by the result.

Respondents insist that the securityholders of the Debtor have been fully informed of the true facts of the instant case when they voted approval of the instant plan of reorganization. We have seen how well informed the scattered small preferred shareholders have been, when sixty per cent of them deposited their shares with the Respondent Committee in approval of the first plan of reorganization, by which they were, in effect, completely wiped out (I-138-9). Even if the elimination of those securityholders were a rightful one, it is only human nature that the securityholders would have at least objected to their elimination if they had understood what was happening to them. Their utter inability to grasp a situation as involved as the instant one, especially in the light of their reliance upon the Respondent Committee for disinterested representation and protection, is easily understandable. To say that such shareholders are well informed is to utterly disregard the true situation.

The Respondent Committee seeks to avoid the force of the Securities and Exchange Commission Report by urging that no action was ever taken against their particular committee. The fact is that the S. E. C. Report deals only with sample situations of abuses by reorganization committees. The S. E. C. has not attempted to control the instant committee or similar committees. Until the passage of the recent Chandler Act, which took

effect only within the past three months, the S. E. C. had no power to control reorganizations committees operating in the course of judicial reorganization (Sec. 77 B (h) of Bankruptcy Act; Secs. 172-4, 208 of Chapter X of Chandler Act). It thus had no power to intervene in the instant proceedings and its failure to do so cannot be deemed an approval of the Respondent Committee's actions.

No attempt is made by respondents to deny that certain large preferred shareholders who voted for approval of the instant plan, had special interests of their own. Respondents insist that despite their special interests, those preferred shareholders are nonetheless entitled to vote. Assuming that to be true, we ask merely that this Court refuse to give weight to acceptances by securityholders whose interests as we have shown, are contrary to the interests of the preferred shareholders as a class.

CONCLUSION

Respondents have presented a maze of unsupported assertions, mis-statements of fact and camouflaging of issues in their attempt to avoid an adjudication of the true merits of the instant case. We submit that a consideration of the true issues and facts of the instant case, discloses that the Standard claim is invalid in its entirety and that there can be no conceivable justification for its compromise allowance at $5,000,000 or any other amount. We further urge that by an unfairly low appraisal of the Debtor's assets, coupled with the unwarranted compromise allowance of its claim, Standard has thus far successfully deprived the preferred shareholders of their rightful participation in the Debtor's assets.

We respectfully submit that the orders of the District Court should be reversed and that relief be granted to petitioners as set forth in our main brief.

Respectfully submitted,

JASON L. HONIGMAN,
Counsel for Petitioners.

A. W. SEMPLINER,
TRAVIS I. MILSTEN,
MILTON J. MILLER,
Of Counsel.